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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 721

ANTHONY AND MARY LOU MASTROPOLE,

versus

TRANSIT HOMES, INC., AND LEON TODD, OF WHOM TRANSIT HOMES, INC., IS PETITIONER

ANSWER OF RESPONDENTS

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DONALD A. FANNING,
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REPLY TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

The Respondents, Anthony and Mary Lou Mastropole, respectfully submit the enclosed Brief and request that said Petition for Certiorari be denied.

JURISDICTION

The jurisdiction of this Court is allegedly invoked under Section 28 U. S. C., Sec. 1257 (3) and must further

comply with Revised Rule 19 of The Supreme Court of The United States.

QUESTION PRESENTED

This was an action for property damage to a mobile home transported by Petitioner in interstate commerce from Virginia to South Carolina. The owners were awarded $5,103.00 actual damages and $45,000.00 punitive damages by the jury in the lower court, which was affirmed on appeal by the South Carolina Supreme Court. The question for this Court is as follows:

(1) Did the Petitioner properly raise the Federal Statutes and Federal Law which he now wishes to rely on and the Federal Decisions with regard to punitive damages in the State proceeding?

STATEMENT OF FACTS

This is an action arising out of tort allegedly sustained by the Respondents herein as a result of damage to their mobile home and further damages resulting from the unreasonable delay of Transit Homes, Inc., in transporting the mobile home to Beaufort, South Carolina from Paradise Estates at Stafford, Virginia.

Previous to the trying of the case, the Defendants made certain motions, one of which was that the parties agree that this to be a tort action, which motion was consented to by the Plaintiffs and so agreed by counsel and was the theory upon which the case was tried (Trial Transcript, 13, f. 50, 14 f. 53). It appeared that the Defendants desired that the Plaintiff be put to the greater degree of proof by requiring the Plaintiff to proceed in tort (Trial Transcript, 14 f. 52).

At the conclusion of the testimony, the Appellant moved for a directed verdict, which verdict was granted as

to several allegations of the Plaintiff's Complaint, but at no time did the Appellant ask for a directed verdict as to punitive damages or request the Court to charge the Carmack-Cummins Amendment, 49 U. S. C., Section 20(11). The issues to be submitted to the jury were only those of tort which was the theory on which the case was tried and the Appellant took no exceptions and, in fact, had no further request to charge (Transcript, Page 315, f. 1259).

The Petitioner indicates that the issue for punitive damages was raised on the motion for directed verdict and refers to Transcript, Page 272. I beg reference at this time to Page 272, as Page 272 indicates that no issue of Federal Law or issue as to punitive damages was raised (Petitioner's Petition, Page 4, Paragraph I of Petition; Transcript Page 272).

Only at the termination of the trial of the case and after the jury had rendered its verdict, and approximately a month after the Petitioner had time to prepare lengthy motions for new trial and Judgment *Non Obstante Veredicto* did the Petitioner seek to raise the issues it now seeks to have this Court consider as Exceptions No. 3 and 4 of its original Motion. State of South Carolina Supreme Court thereafter held that "this exception raises no issue for determination by us because no motion was made at the trial that the issue of punitive damages be withdrawn from the jury or that a verdict be directed for the Defendant as to such damages. The *non obstante* rule may be revoked only when a timely motion has been made at the trial." Appendix A, Page 20. It is submitted that no substantial Federal question was raised by the pleadings or otherwise until after the verdict by the jury and that this Court should not exercise jurisdiction in this matter.

REASONS FOR DENYING WRIT

The Petitioners now wish to raise a Federal question when no Federal question was properly raised at the trial of the case and the case was tried on the theory of tort, putting the Plaintiffs to the greater burden of proof, as stated in the case of *Whitney v. California*, 274 U. S. 357 (1927):

> "Specific Federal questions must be properly raised and presented in the State proceeding in accordance with the rules and pleadings of procedure in that state."

The defendants in this case never made the motion for a directed verdict as to punitive damages or any motion based on Federal law upon which it intended to rely. Section 5, Am. Jur. (2d), Sections 545 through 552 set forth the general rule concerning appeal and error. The general rule is best stated as follows:

> "That questions, in order to be available on appeal or review, must be raised and reserved in the lower court and that the higher court can consider the case only on the theory of the parties in the lower court." Am. Jur. (2d), Section 545 through 552.

In the case of *Gray v. St. Louis-San Francisco Railway Company*, 1926, 243 Pacific 1050, 120 Kansas 427, Certiori Denied, 47 S. Ct. 107; 273 U. S. 714; 71 Law Ed., 854, the Plaintiff sued under Section 20-11 for damages to goods in shipment but relief on the Common Law Rule for damages at the trial and on appeal and it was held that Plaintiff may not, on petition for rehearing, ask for a reversal to base his damages on Section 20-11. Although this rule was applied to the Plaintiff, the same rule should apply to the Defendants in this action.

CONCLUSION

For these reasons, the Writ of Certiorari should be denied.

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